Nos. 14-2274 and 14-2275

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

and

SIERRA CLUB,

Intervenor-Plaintiff-Appellant,

v.

DTE ENERGY COMPANY and DETROIT EDISON COMPANY,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of Michigan,
No. 10-13101 (Hon. Bernard A. Friedman)

MOTION OF DEFENDANT-APPELLEES DTE ENERGY COMPANY AND DETROIT EDISON COMPANY TO STAY THE MANDATE PENDING FILING OF A PETITION FOR WRIT OF CERTIORARI

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DATED: May 8, 2017

Pursuant to Federal Rule of Appellate Procedure 41(d)(2) and Sixth Circuit Rule 41(a), Defendant-Appellees DTE Energy Company and Detroit Edison Company (collectively, DTE) respectfully move this Court for a stay of this Court's mandate pending the filing and ultimate disposition of a petition for a writ of certiorari.[1] This motion is timely filed within seven days of this Court's entry of an order denying Defendant-Appellees' petition for en banc and panel rehearing. *See* 6 Cir. R. 41(b). DTE intends to file a timely petition for a writ of certiorari with the Supreme Court.

Preliminary Statement

The New Source Review provisions of the Clean Air Act's (CAA) Prevention of Significant Deterioration (PSD) program regulate "new" sources of air pollution—projects that increase the amount of emissions and thus deteriorate air quality. These provisions thus apply to an existing power plant only when it undergoes "modification," which the statute defines as a change that "increases the amount" of pollution. 42 U.S.C. § 7411(a)(4). EPA's regulations, in like fashion, state that a triggering "major modification" is one that causes a significant increase in emissions. 40 C.F.R. § 52.21(a)(2)(iv)(*a*),

[1] Counsel for DTE have conferred with counsel for Plaintiff-Appellant the United States of America and counsel for Intervenor-Plaintiff-Appellant Sierra Club regarding this motion. Based on those conversations, Counsel understands that neither party will take a position on the motion.

(*b*); *id.* § 52.21(b)(2). Accordingly, both the Supreme Court and the D.C. Circuit have observed that the CAA will not allow major modification to be defined by any standard that ignores actual emissions. *See Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 569 ("EPA's 1980 PSD regulations require a permit...only when it would increase the actual annual emission of a pollutant above the actual average for the two prior years."); *New York v. EPA*, 413 F.3d 3, 38-40 (D.C. Cir. 2005) ("[T]he CAA unambiguously defines 'increases' in terms of actual emissions.").

After two appeals and five opinions that articulate three distinct interpretations of EPA's NSR provisions, this Court has reached a different conclusion. Oddly, had the issues presented over the life of this enforcement action been resolved by this Court in one sitting, this would not be so—two of the three judges on this Court, if writing on a blank slate, would hold that the Government cannot enforce the NSR-permitting trigger using a test that is completely untethered from whether the project in question caused any increase in emissions. *See United States v. DTE Energy Co.*, 711 F.3d 643, 652 (6th Cir. 2013) (*DTE I*) (Batchelder, J., dissenting); *United States v. DTE Energy Co.*, 845 F.3d 735, 745 (6th Cir. 2017) (*DTE II*) (Rogers, J., dissenting). Yet, the opinion of Judge Daughtrey announcing the judgment of the Court states that the absence of a significant increase in emissions caused by the project is

legally irrelevant, *DTE II*, 845 F.3d at 738 (Daughtrey, J.), meaning that PSD permitting can be triggered retroactively by projects that have not caused any deterioration in air quality, much less a significant deterioration.

This case fairly cries out for Supreme Court intervention. The Supreme Court has identified the application of the "emissions increase" requirement as an issue of national significance justifying the grant of certiorari. *See Envtl. Def.*, 549 U.S. at 578-79. And given the wide variance in interpretations within this Court, the fact that a majority of this Court rejects retroactive enforcement in cases where the project has caused no significant increase in actual emissions, and the tension between this Court's lead opinion and the holdings of other circuits, there is a reasonable probability that four Justices will vote to review the substantial question of whether PSD permitting can be required where there demonstrably and incontrovertibly has been an emissions reduction.

Another substantial question presented by this Court's lead opinion is whether it has erroneously allowed the Government to enforce NSR using a standard that, in addition to conflicting with the statutory and regulatory text, has been developed solely for litigation and has never been published. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC*

v. Fox Television Stations, Inc., 567 U.S. 239, ___, 132 S. Ct. 2307, 2317 (2012). The standard the Government seeks to enforce, and which the lead opinion endorses, is based on a specific emission-projection methodology that is neither specified in EPA's regulations nor mandated by statute. This creates the prospect of penalties sought under federal environmental laws that are "'notoriously unclear.'" *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring).

Argument

Staying the mandate is appropriate where a petition for a writ of certiorari would present a "substantial question" and where there is "good cause for a stay." Fed. R. App. P. 41(d)(2)(A); 6 Cir. R. 41(a). Both of these factors are satisfied here.

I. This Case Presents Substantial Questions.

A "substantial question" exists where there is a "reasonable probability that four Justices will vote to grant certiorari as well as a reasonable possibility that five Justices would vote to reverse" the circuit court's judgment. *Jepson v. Bank of N.Y. Mellon*, 821 F.3d 805, 807 (7th Cir. 2016). The "reasonable probability" standard demands only that there is a "reasonable" chance—not a near-certainty—that four Justices will vote to grant certiorari. Under this standard, the Court should "consider carefully the issues that the applicant

plans to raise in its certiorari petition in the context of the case history, the Supreme Court's treatment of other cases presenting similar issues and the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari." *Senne v. Vill. of Palatine, Ill.*, 695 F.3d 617, 619 (7th Cir. 2012).

A. The Panel's Divided Disposition Highlights an Important Issue of Federal Law That Has Not Been, But Should Be, Settled by the Supreme Court.

The CAA's PSD program regulates deterioration in air quality resulting from "new" major stationary sources of pollution as well as existing sources that experience "major modification," requiring these sources to undergo preconstruction review and permitting. 42 U.S.C. §§ 7470, *et seq.*, 40 C.F.R. § 52.21. As part of that process, these sources may be required to install additional emission controls.

To prevent deterioration in air quality, the PSD program requires existing sources undertaking changes to predict whether the change will cause an actual increase in emissions above past baseline levels. *See* 42 U.S.C. §§ 7470(5), 7473, 7479(4). The statute thus defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which *increases the amount* of any air pollutant emitted by such source...." 42 U.S.C. § 7411(a)(4) (emphasis added). EPA's rules then specify

certain basic criteria a source must follow in making the prediction, but do not specify any methodology for the prediction or any criteria governing the weight to be given by the source owner to any relevant information. *See* 40 C.F.R. § 52.21(a)(2)(iv)(*a*), (*b*); *id.* § 52.21(b)(2). As a result, while a source might violate the requirement for a pre-construction emission projection by failing to make the projection or by ignoring the basic criteria for the projection, EPA's rules provide that the accuracy of that prediction—i.e., whether a major modification has occurred—must be tested by measured, actual emissions following the project. *DTE I*, 711 F.3d at 652.

Outside the litigation context, EPA has acknowledged the import of the statutory text's focus on actual emissions time and again. It has explained that "[the] [NSR] program's *limited object is to limit significant emissions increases* from new and modified sources." EPA, EPA-456/R-03-005, *Technical Support Document for the Prevention of Significant Deterioration (PSD) and Nonattainment Area New Source Review (NSR): Reconsideration* at 105 (Oct. 30, 2003) (emphasis added), https://www.epa.gov/sites/production/files/2015-12/documents/petitionresponses10-30-03.pdf. And EPA has emphasized that the NSR rules are designed to ensure "that *only* changes causing a *real* increase in pollution are subject to NSR." Br. for Resp't EPA at 76, *New York v. EPA*, No. 02-1387, 2004 WL 5846388, at *76 (D.C. Cir. Oct. 26, 2004) (emphases

added). That is because actual emissions—not projected-but-never-realized emissions—are what cause air quality to deteriorate.

In this case, the panel's apparent holding deviates from the statutory text, the regulatory text, and EPA's repeated pronouncements. Specifically, it substitutes for the definition of "major modification" found in the statute and in EPA's implementing regulations—i.e., a change that causes an actual increase in emissions—one not found in the statute. Indeed, even though the Government's position has been rejected by a majority of the judges on this Court to have considered it[2], after two appeals and five opinions, this Court has issued opinions demoting a demonstrable actual emissions *decrease* to the status of irrelevancy. *DTE II*, 845 F.3d at 738 (Daughtrey, J.); *id.* at 744 (Batchelder, J., concurring). Under this Sixth Circuit rule, a source may be subject to having its prediction of actual emissions second-guessed by EPA and its experts, even if the source's prediction is borne out by actual, measured post-project emissions.

The major modification regime the panel has created for the Sixth Circuit not only conflicts with the regulations and the statute, but also is in tension with decisions of the Supreme Court and D.C. Circuit. In

[2] *DTE I*, 711 F.3d at 652 (Batchelder, J., dissenting); *DTE II*, 845 F.3d at 745 (Rogers, J., dissenting).

Environmental Defense Fund v. Duke Energy Corp., the Supreme Court observed that, while the major modification program may be "no seamless narrative," 549 U.S. at 577, the one point that is "relatively clear" is that a permit is required "only when [a project]...would increase the actual annual emission of a pollutant above the actual average for the two prior years." *Id.* at 569. In *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005), the D.C. Circuit observed that "the CAA unambiguously defines 'increases' in terms of actual emissions." *Id.* at 39. As the D.C. Circuit explained, "the plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions." *Id.* at 40. Yet, two of the opinions of this Court appear to conclude that the statutory text allows an alternative definition of "modification" that does not focus on whether the projects increased actual emissions. Indeed, they would apparently allow the conclusion that a major modification occurred even where emissions have verifiably decreased.

For these reasons, this Court's opinions present a substantial question for certiorari. The NSR program applies to all major power plants and manufacturing facilities. The opinions of this Court will create conflict among how this program applies in the Sixth Circuit and in other circuits regarding what does, and does not, constitute a major modification. This uncertainty will deter the type of improvements that increase reliability and efficiency but

do not increase emissions.[3] The broad impact of this uncertainty creates an issue of national significance that will justify granting certiorari. In addition, the very fact that two judges on this circuit would hold, had they been writing on a clean slate, that the regulations cannot be read to allow EPA to pursue the type of enforcement action it seeks to pursue, and that this case has produced three distinct views from this Court as to what the regulations actually mean, confirm the substantial question presented.

B. The Panel's Holding Allows Enforcement That Does Not Comport With Fair Notice Obligations Under the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

Another substantial question presented by the Court's decision is whether it incorrectly vindicates a regulatory regime that is so vague that it cannot be applied consistent with the fair notice requirements of the Due Process Clause of the Constitution.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fox Television*, 132 S. Ct. at 2317 (citing *Connally v. Gen. Constr. Co.*,

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[3] EPA, *Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules* at 5 (Nov. 21, 2002), https://www.epa.gov/nsr/supplemental-analysis-environmental-impact-2002-final-nsr-improvement-rules.

269 U.S. 385, 391 (1926)). "A...punishment fails to comply with due process if the statute or regulation under which it is obtained...'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Id.* (quoting *United States v. Williams,* 553 U.S. 285, 304 (2008)). Thus, when an agency leaves a governing regulation vague, it cannot, consistent with due process, exploit that vagueness to establish a hitherto unpublished standard of liability:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Christopher v. SmithKline Beecham Corp., 567 U.S. 142, ___, 132 S. Ct. 2156, 2168 (2012).

The Government's reliance on a made-for-litigation projection methodology as its standard of liability presents precisely these due process concerns. As Judge Batchelder notes, the Government has never even alleged that DTE failed to comply with the projection regulations—an allegation of liability that would at least measure DTE's conduct against a published standard. *DTE II,* 845 F.3d at 744-45 (Batchelder, J., dissenting). It contends instead that DTE constructed a major modification without a permit. But because emissions have not increased after the projection, the Government can

only attempt to prove that the Monroe 2 projects were major modifications by showing that, under the Government's preferred methodology, DTE should have projected an increase that never occurred in reality. *Id.* at 743. Even worse, the Government's preferred methodology would assume that the (hypothetical and counterfactual) increase was caused by the project.

The administrative history behind the regulations the Government relies upon only deepens the insult to due process. When EPA originally proposed the revisions to the NSR rules ultimately promulgated in 2002, EPA specifically considered doing away with the portion of the rule requiring that an increase be "caused" by a project because it did not include a specific methodology for applying it. EPA noted:

> *Because there is no specific test available for determining whether an emissions increase indeed results from an independent factor such as demand growth, versus factors relating to the change at the unit, each company with a utility unit present adopts its own interpretation.* Interpretations may vary from source to source, as well as from what a permitting agency would accept as appropriate.

63 Fed. Reg. 39,857, 39,861 (July 24, 1998) (emphasis added). But in the end, EPA not only kept the causation requirement, it expanded its availability. By 2007, EPA concluded that "[i]n most cases, it is unlikely that 'demand growth' emissions could ultimately be found to be related to changes made at a facility," and that the record-keeping and reporting requirements of the rule

would be "sufficient...to verify post-project demand growth," and whether there is "ultimately...a significant emissions increase" caused by the project 72 Fed. Reg. 72,607, 72,610-11 (Dec. 21, 2007).

EPA thus expressly recognized at the time of their adoption that the very provision in the regulations that the Government contends DTE misapplied is expressly designed to allow for a multiplicity of approaches in real-world application that may deviate from what the agency would choose. And rather than eliminate this potential for varying approaches as a means of regulatory control, it instead expressly adopted as a better means of insuring overall fidelity to the statute the record-keeping requirements that would provide actual data necessary to demonstrate whether a project did, in fact, cause a significant increase in emissions.

II. There is "Good Cause" to Stay the Mandate.

Good cause exists to stay the mandate where "irreparable injury" will occur if the stay is not granted. *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001). Resolving that question involves "balanc[ing] the equities of granting a stay by assessing the harm to each party if a stay is granted." *Id.*

The equities strongly favor staying the mandate in the case. If remanded, both the Government and DTE will need to expend considerable resources preparing the case for trial in accordance with this Court's judgment.

Compounding that burden, the fractured decision by the panel will necessitate additional expense to litigate over what this Court actually held. That expense will be unnecessary if the Supreme Court grants certiorari and decides the issues presented in DTE's favor or otherwise clarifies the approach required.

In contrast, there is little benefit to immediate remand. Most significantly, DTE already completed its planned program to install advanced emission controls on Monroe 2 in 2014, so speedy resolution in the district court is not necessary to obtain any air-quality benefit. As a result of this program, actual emissions not only decreased after the projects at issue here, they have decreased substantially. And but for the few months the case was remanded to the district court after *DTE I*, litigation in the district court has been on hold since 2011. A delay of a few additional months will make little practical difference, while providing an opportunity for the Supreme Court to resolve this unsettled question of law so that any further litigation after the Court's decision may proceed more efficiently.

Conclusion

The NSR regulations require permits to control new emissions that would deteriorate air quality. Whether that permitting requirement can be triggered retroactively when a project has not caused an actual increase in emissions is an unsettled and important question of federal law, a fact amply

demonstrated by the three distinct answers to that question offered by the three Judges on this Court to consider the case. Whether the prevailing view of this court creates an unconstitutionally vague regulatory regime by allowing the Government to impose punitive liability by applying a standard and requirements that are not specified in the regulations creates yet another substantial question. The Court should stay the mandate.

Respectfully submitted,

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Dated: May 8, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27(d)(2) and 32(f) and (g) of the Federal Rules of Appellate Procedure and Circuit Rule 32, I hereby certify that the foregoing document contains 2,997 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court. I further certify that this document complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure as it was prepared using the Microsoft Word 2010 word processing program in 14-point Calisto MT font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that on this 8th day of May, 2017, I served a copy of the foregoing document electronically through the Court's CM/ECF system on the following registered CM/ECF counsel of record:

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